Supreme Court, U.S.
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CASE NO. 99-733

IN THE SUPREME COURT OF THE UNITED STATES

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**BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,**
Petitioners,

-

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
Respondents

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Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

# PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I. THIS CASE RAISES IMPORTANT FEDERAL QUESTIONS WHICH CANNOT BE DECIDED EXCLUSIVELY ON STATE COMMON LAW GROUNDS

### A. THE THIRD CIRCUIT'S DECISION ON RHETORICAL HYPERBOLE WAS BASED ON FEDERAL CONSTITUTIONAL DOCTRINE

While defamation is a state law cause of action, there is no question that major aspects of defamation law have been constitutionalized by this Court. As a result, *every* state law defamation claim raises First Amendment issues which, if decided in conflict with Supreme Court precedent, are properly submitted to this Court for review by writ of certiorari.

The law of rhetorical hyperbole is a constitutionally-based privilege recognized by this Court in *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970) and its progeny. It was not developed by Pennsylvania state courts.

The District Court found Respondent Trump's accusation that Petitioner Dotson "had devoted his entire career to busting unions" to be non-actionable rhetorical hyperbole uttered in the context of a labor dispute. The District Court concluded that the statement would not have been taken literally by any person (A16), and cited *Old Dominion Branch No. 496 National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) to support its conclusion. (A15).

The Court of Appeals affirmed the District Court's holding, also citing *Greenbelt*, as well as two Pennsylvania decisions and the Restatement (Second) of Torts. Respondents assert that the Court of Appeals actually based its ruling on the Pennsylvania decisions, and "merely cited *Greenbelt* as an additional authority." (Brief in Opp., at 7). One of the Pennsylvania decisions cited by the Third Circuit,

however, *Redding v. Carlton*, 296 A.2d 880, 881 (Pa. Super. 1972), applies the rhetorical hyperbole analysis only after discussing the constitutionalization of the law of defamation, citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and specifically analyzing *Greenbelt* in a lengthy footnote. *Redding*, 296 A.2d 881-82, n. 2.

Review by this Court is required because the Third Circuit applied a constitutional privilege to Respondent's statements, without first performing the requisite constitutional analysis. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) holds that the rhetorical hyperbole privilege cannot be invoked without analyzing the meaning of the words used and whether those words contain a factual connotation capable of being proven true or false. By merely labeling Respondent's union-busting allegation as non-actionable rhetorical hyperbole, without first analyzing meaning, the Third Circuit has decided an important federal question in a way that clearly conflicts with this Court's precedent.

Respondents admit that the appeals court did not engage in a *Milkovich* analysis, but boldly assert that no such analysis was necessary because the First Amendment is "beside the point" in this case. (Brief in Opp., at 16). The First Amendment, however, is never beside the point in a defamation case, and the appellate court's failure to engage in a constitutional analysis of meaning is precisely why certiorari should be granted.

The Third Circuit is not alone in failing to properly analyze a statement's meaning before affording constitutional protection. In addition to the numerous examples cited by Petitioners to the Court in their Petition for Writ of Certiorari, the 11th Circuit also has gotten it wrong. Just three days before the Petition in this case was filed, the 11th Circuit decided *Dunn v. Airline Pilots Association*, 193 F.3d

1185, 1999 U.S. App. LEXIS 26823 (11th Cir. 1999). In *Dunn*, the plaintiff airline pilots had been included by their union, the Airline Pilots Association ("ALPA"), on a "scabs" list published by the ALPA during a sympathy strike of Eastern Airlines. The pilots sued for defamation, claiming they were not "scabs" because there had been no properly authorized strike, but only an unauthorized work stoppage. Analyzing the truth or falsity issue only from the viewpoint of the reasonable reader, the majority rejected the plaintiffs' argument that a determination of truth in this context must begin with an analysis of whether the union was legally on strike. *Dunn*, 1999 U.S. App. LEXIS at *19-21.

In a persuasive dissent, Judge Tjoflat suggests that the reasonable reader test was inadequate to determine the truth or falsity of the "scab" allegation, since "scab" is a factual allegation with specific definitions and consequences. The dissent argued that it was just as important to analyze the *intended* as well as the *received* meaning:

> In this case, we must assume that ALPA intended, through the publication of the scab list, to convey that its strike was legal. A contrary assumption would mean that ALPA published a list of all the pilots who worked during a strike it illegally ordered. Although it is theoretically possible that ALPA wanted to convey such a message, it is highly unlikely, for such a message would only harm the union.

*Id.* at *54-55. Clearly, even individual judges on the same federal appellate panel have different understandings of how meaning is to be derived under this Court's precedent.

## B. LABOR DISPUTE DEFAMATION IS ALSO GOVERNED BY SUPREME COURT DOCTRINE

Congress, by passing the National Labor Relations Act, intended to establish a uniform national labor policy. In *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966), this Court determined, as a matter of federal law, that a party defamed during the course of a labor dispute must prove that the statements were published with actual malice, and that they caused the plaintiff actual harm.

Petitioners have pled both actual harm and actual malice. Still, the Third Circuit found Petitioners' pleading deficient with regard to two of the statements at issue because of Petitioners' failure to meet Pennsylvania's requirement to plead special damages in slander *per quod* cases. Thus, even though the federal standards of *Linn* have been met, Petitioners find themselves without remedy for admitted defamation arising in the context of a labor dispute.

Respondents have not articulated *any* overriding state interest which would justify Pennsylvania's slander *per quod* exception to the rule set forth in *Linn*. Hence, the imposition of a state common law special damages requirement in a labor dispute defamation case, where actual malice and actual harm are present, is clearly in conflict with the relevant precedent of this Court.

Respondents argue that courts can avoid federal labor law analysis merely by ignoring relevant federal precedent. (Brief in Opp., at 20). Congress and this Court, however, have determined that labor matters are to be treated differently, and that a uniform set of rules are to apply nationally. Respondents argue that Pennsylvania law overrides federal labor law in this case because its special damages requirement applies to all *per quod* defamation plaintiffs,

and not just labor dispute defamation plaintiffs. (Brief in Opp., at 21). In essence, Respondents' argument is that federal labor law, like the First Amendment, is beside the point.

## II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH PENNSYLVANIA SUPREME COURT DECISIONS ON IMPORTANT FEDERAL QUESTIONS

Respondents' primary contention is that this case has been decided exclusively on state law grounds and does not involve federal law or constitutional doctrine. Even on state law grounds, however, the Third Circuit got it wrong. Its decision affirming the District Court's dismissal of Petitioners' Complaint conflicts with Pennsylvania's court of last resort on an important federal question involving defamation

### A. PENNSYLVANIA'S CONSTITUTIONAL PROTECTION OF REPUTATION CANNOT BE IGNORED

The Third Circuit's decision imposes a special damages requirement on defamation plaintiffs in Pennsylvania that is not required under relevant precedent of this Court. By increasing a defamation plaintiff's burden of pleading and proof and, consequently, enhancing the protections available to defamation defendants, the Third Circuit is in direct conflict with the Pennsylvania constitution, which protects reputation as an inalienable right. The Pennsylvania Supreme Court has interpreted its constitution to mean that Pennsylvania courts may not expand the protections afforded speech by the First Amendment beyond what is provided by this Court. *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988). The Third Circuit, by requiring *per quod* defamation plaintiffs to prove more than this Court's decisions require to recover damages, has expanded

the protections afforded speech beyond those found in the First Amendment, in clear violation of Pennsylvania law.[1]

Respondents do not deny that the Third Circuit's decision expands First Amendment protections for speech beyond what has been afforded by this Court, and do not dispute that the Third Circuit's decision violates the Pennsylvania constitution. Instead, Respondents argue that none of that matters because "the Court of Appeals based its decision on the Pennsylvania law of slander not the Pennsylvania Constitution." (Brief in Opp., p. 18, n. 4).

Respondents' position is that the Court of Appeals is free to ignore the Pennsylvania constitution, just as it is free to ignore the First Amendment and federal labor law. Respondents fail to explain, however, how a state's constitutional protection for reputation can be deemed irrelevant to Pennsylvania slander law. In fact, the two cannot be separated, and no defamation case in Pennsylvania can be decided without due regard for Pennsylvania's constitutional protection for reputation.

### B. TRUMP'S TELEVISED STATEMENTS ARE LIBEL, NOT SLANDER, UNDER PENNSYLVANIA LAW

The parties agree that Pennsylvania has eliminated the *per se/per quod* distinction in libel cases, even if it has not expressly

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[1] Whether the courts below relied on public figure doctrine is not important because the question presented by Petitioners to this Court is not limited to public figure defamation cases. Petitioner Dotson is a public figure, and publication with actual malice was alleged. But even if Petitioners were private figures, actual malice would be the standard for defamation arising in a labor dispute. Thus, the broader question presented is whether a court of appeals may provide greater protection than this Court's actual malice standard when doing so conflicts with the state's highest court.

done so in slander cases. (Brief in Opp., p. 19, n. 5). With regard to Trump's statement at the Town Hall meeting, therefore, Petitioners have argued that 1) the rules of libel should apply, since Trump's Town hall meeting was televised; and, 2) there is no special damages requirement for libel plaintiffs in Pennsylvania.[2]

Respondents contend that broadcast statements are libelous when the defendant is the broadcast company, and slanderous when the defendant is the speaker. (Brief in Opp., p. 20, n. 5). Respondents cite no authority for this illogical distinction.

Historically, libel and slander were treated differently because of the more long-lasting harmful effect of the written word. The Pennsylvania Supreme Court has recognized that this distinction is not valid in the age of electronic media. "As . . . for slander and libel, *the common law distinctions between these two terms not being applicable to the law of radio.*" *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167 (1963) (emphasis added).[3]

It is the wide dissemination that results from a television and radio broadcast that requires it to be treated as libel and not slander. Rodney A. Smolla, *The Law of Defamation* §1.04[4], at 1-11 (1998).

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[2]Contrary to Respondents' contention (Brief in Opp., p. 19, n. 5), the lack of special damages was a basis for the Court of Appeals' decision regarding Trump's Town Hall statements. "Moreover, to the extent the statement is susceptible of another defamatory interpretation that does not constitute an accusation of criminal wrongdoing, such interpretation would not constitute slander *per se* and, as a result [Petitioners'] Complaint would be insufficient for failure to allege special damages." (A12).

[3]Although Respondents claim this statement from *Purcell* was merely dicta (Brief in Opp., p. 20, n. 5), the case was later cited by the Pennsylvania Supreme Court in *Schonek v. WJAC, Inc.*, 436 Pa. 78, 82, 258 A.2d 504, 506 (1969) in support of the proposition that a defamation case based upon a radio broadcast statement should have been for libel rather than slander.

Clearly, it is the potential impact of the published statement, and not the identity or role of the speaker, that turns a traditionally slanderous statement into libel.

## III. ALL ARGUMENTS RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE RAISED BELOW

### A. PETITIONERS ARGUED BELOW THAT *MILKOVICH* REQUIRES AN ANALYSIS OF MEANING

Respondents assert that Petitioners did not argue below "that the First Amendment somehow imposed a burden on the District Court or the Court of Appeals to conduct a particular form of analysis before concluding" that a statement is nonactionable rhetorical hyperbole. (Brief in Opp., p. 9). Respondents are wrong. Approximately four pages of Petitioners' merit brief in the Third Circuit is devoted to an analysis of rhetorical hyperbole and meaning under *Milkovich*. (A95-98).[4] Petitioners' argument in support of certiorari merely discusses in greater depth how meaning is to be analyzed under *Milkovich* and *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

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[4]The *Milkovich* analysis and argument was presented to the Third Circuit only in the context of the Dole-Kemp rally statements because the District Court had applied legislative immunity to the Town Hall meeting statements, and did not reach any conclusions about the meaning of those statements. In opposing Respondents' Motion to Dismiss in the District Court, however, Petitioners argued that Trump's statements at the Town Hall meeting were capable of a defamatory meaning as well

## B. PETITIONERS ARGUED BELOW THAT PENNSYLVANIA LAW LIMITS THE PROTECTIONS AVAILABLE FOR SPEECH

Petitioners do not argue for the first time that Pennsylvania law limits what protections the federal courts may afford Pennsylvania defamation defendants. In fact, Petitioners focused on Pennsylvania's unique protection for reputation in the first sentence of the "Summary of Argument" section of their merit brief in the Third Circuit. (A74). Later in that brief, Petitioners cite to both the Pennsylvania constitution and *Sprague v. Walter* to support their argument that Pennsylvania courts may go no further than this Court in protecting First Amendment principles. (A104). Finally, as acknowledged by Respondents in their opposition brief, the issue of the continuing viability of the *per se/per quod* distinctions was addressed in post-argument letters submitted to the Third Circuit. (Brief in Opp., p. 19, n. 5).[5]

## C. PETITIONERS ARGUED BELOW THAT *LINN* GOVERNED THIS ACTION TO THE EXTENT IT CONCERNED LABOR DISPUTE DEFAMATION

Respondents' assertion that Petitioners have not previously argued that the standards established by *Linn v. United Plant Guard Workers* govern this dispute is spurious. *Linn* was cited by Petitioners numerous times in their merit brief to the Third Circuit. In fact, Petitioners identified the decision as "[t]he seminal case on defamation in a labor dispute context, . . . ." (A104). Petitioners also cited

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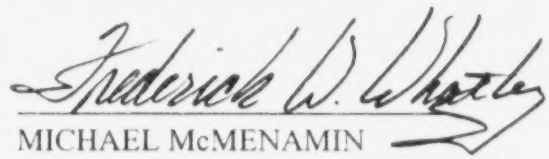
[5] Respondents imply that these post-argument letters should be ignored. This position is disingenuous since it was Respondents' request at oral argument to further brief the *per se/per quod* distinction, after their oral argument time had expired, that led to the filing of the post-argument letters — not an unsolicited "invitation" from the court.

*Austin* to support their argument that Trump's statements were capable of a defamatory meaning. (A97). While Petitioners argued in the courts below that Trump's statements at the Dole/Kemp rally did not arise in the context of a labor dispute (Brief in Opp., p. 11), Petitioners also argued in the alternative that, if the court considered Trump's statements to have arisen in the context of a labor dispute, then the standards set forth in *Linn* must be applied and, under *Linn*, Petitioners had stated a viable claim for relief.

## IV. CONCLUSION

For these reasons, and for the reasons set forth in their Petition for Writ of Certiorari, Petitioners respectfully request that the Writ of Certiorari be granted.

Respectfully submitted,



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Petition for Writ of Certiorari to the
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# APPENDIX (CONTINUED) TO PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CASE NO. 98-3222

On Appeal From The United States District Court, Western District of Pennsylvania's Dismissal of Appellants' Original Cause of Action in Case No. 97-1490

BEVERLY ENTERPRISES; DONALD L. DOTSON,
Appellants

v.

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Appellees

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## I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction over these consolidated cases was proper in the District Court pursuant to 28 U.S.C. §1332 in that complete diversity of citizenship existed between all Plaintiffs and all Defendants and the amount in controversy exceeds $75,000, exclusive of interest and costs.

Appellate jurisdiction in this Court is proper as an appeal of right pursuant to 28 U.S.C. §1291, in that Appellants Dotson and Beverly timely filed a Notice of Appeal on April 3, 1998 from a final order of the District Court for the Western District of Pennsylvania disposing of all claims with respect to all parties.

## II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in concluding that the "Town Hall" meeting was an official legislative proceeding entitling Appellee Rosemary Trump to absolute immunity for her statements concerning Dotson and Beverly where:

a. The "Town Hall" meeting was scheduled and its agenda planned by the SEIU long before H.R. 1624 had been introduced in Congress, which happened only a few days before the "Town Hall" meeting was held, and formal legislative hearings on the bill were never scheduled or held;

b. The hearing was neither sanctioned nor sponsored by any committee or subcommittee of Congress; attendance by speakers was voluntary and all statements at the meeting were unsworn; and none of the members of Congress in attendance at the meeting were members of the committees or subcommittees to which any relevant pending legislation had been assigned;

c. The District Court failed to conduct even a threshold inquiry into whether, given the SEIU's active role, the "Town Hall" meeting was within the sphere of legitimate legislative activities which are eligible for legislative immunity;

d. Trump conceded in papers filed with the District Court that the "Town Hall" meeting was not a legislative proceeding;

e. Trump's statements at the "Town Hall" meeting were not related to any legislative purpose but instead constituted an *ad hominem* attack on Appellant Dotson's ethics and professionalism, and an equivalent assault on Appellant Beverly's business reputation;

f. The District Court ignored the well-pleaded factual allegations of Dotson and Beverly's Complaint, and failed to draw all reasonable inferences in the light most favorable to Dotson and Beverly, all as required when reviewing a motion to dismiss pursuant to Rule 12(b)(6); and,

g. Pennsylvania courts have never afforded absolute immunity to voluntary, unsworn statements made informally to legislators.

2. Whether the District Court erred in considering materials outside the pleadings to support its holding that the informal "Town Hall" meeting was a true legislative proceeding in which Trump was entitled to absolute legislative immunity for her statements concerning Dotson and Beverly when:

a. The parties had both requested that Trump's Rule 12(b)(6) Motion be converted to one for summary judgment under Rule 56; and,

b. Dotson and Beverly were not given the opportunity to discover and present Rule 56 evidence to rebut the extrinsic materials presented by Trump and relied upon by the Court in contravention of Rule 12(b) of the Federal Rules of Civil Procedure.

3. Whether the District Court erred in concluding that Trump's statements at the Dole/Kemp rally were not capable of a defamatory meaning as a matter of law, where:

a. The statements alleged actual facts about Appellant Dotson and could have been taken seriously by those who heard the statements;

b. The statements were a personal attack by Trump on a company official at a presidential campaign rally which had nothing to do with the terms and conditions of employment; and,

c. The Complaint alleges that Trump's statements at the Dole/Kemp rally were made with actual malice, and relevant Supreme Court precedent makes clear that the National Labor Relations Act does not protect the malicious lie.

## III. STATEMENT OF THE CASE

This lawsuit was commenced with the filing of Dotson and Beverly's Complaint on or about August 15, 1997. The Complaint is in two Counts, both sounding in defamation. (Joint Appendix, hereinafter "J.A.," p. 6). The first Count alleges that Appellee Rosemary Trump confronted Appellant Donald Dotson at a political rally in Pittsburgh on August 18, 1996 and made a number of false and defamatory statements about Dotson, including accusations of anti-Semitism, which were heard by the crowd assembled there. Trump, at all times relevant to this matter, was President of the Service Employees International Union, Local 585 ("SEIU"). Count II alleges that Trump again made false and defamatory statements at a "Town Hall" meeting, organized by the SEIU and attended by some local members of Congress friendly to the SEIU, and held at the Allegheny County Courthouse on May 19, 1997, accusing Appellants Dotson and Beverly Enterprises, Inc. ("Beverly") of engaging in criminal violation of federal ethics laws both during and immediately after Dotson's tenure as Chairman of the National Labor Relations Board.

In lieu of an Answer, Appellee Trump filed a Motion to Dismiss on October 15, 1997. (J.A., p. 29). Trump raised numerous substantive and privilege defenses in her Motion. She submitted materials outside of the pleadings to support her arguments and asked the Court to convert her Motion to Dismiss into one for summary judgment pursuant to Rule 56.

On October 30, 1997, Dotson and Beverly filed a Motion to Exclude Extrinsic Materials Submitted in Support of Defendant's Motion to Dismiss. (J.A., p. 105). Dotson and Beverly requested that the materials outside the pleadings submitted by Appellee Trump be excluded. Alternatively, Dotson and Beverly argued that, if the Court chose to consider such materials, the Court must convert Trump's Motion to Dismiss into one for summary judgment, and give Dotson and Beverly an opportunity for discovery. Beverly and Dotson also filed a Brief in Opposition to the Motion to Dismiss on November 7, 1997 (J.A., p. 120). They did not, however, simply rest on their pleadings but also submitted their own extrinsic evidence supporting the Complaint allegations that the "Town

Hall'' meeting was orchestrated and planned by the SEIU long before any relevant legislation was introduced into Congress.

On December 29, 1997, Dotson and Beverly filed a separate Complaint against SEIU Local 585, also based upon Trump's defamatory statements at the ''Town Hall'' meeting.[1] (J.A., p. 306). That Complaint alleged that Local 585 was liable for Appellee Trump's statements at the ''Town Hall'' meeting as they were made by Trump both individually and within the scope of her duties as President of SEIU Local 585. By Order dated February 9, 1998, the District Court consolidated the case against SEIU Local 585 with the case against Trump. (J.A., p. 326).

After full briefing by all parties, the District Court, by Memorandum Opinion and Order dated March 5, 1998, granted Trump's Motion to Dismiss (The District Court's Memorandum Opinion is attached to this Brief at Tab A). The District Court held, as a matter of law, that Trump's statements at the political rally were not capable of a defamatory meaning. The District Court also concluded, based upon the extrinsic materials submitted by Trump, that the ''Town Hall'' meeting was a legislative proceeding and, therefore, Trump was entitled to absolute immunity from liability for any statements she made at that proceeding.

Even though the District Court considered Trump's extrinsic materials in reaching these conclusions (and did not consider the extrinsic materials submitted by Dotson and Beverly), it refused a request by all parties to convert Trump's Motion to Dismiss into one for summary judgment. It instead held that the Complaint failed to state a claim upon which relief could be granted. No ruling was ever made on Dotson and Beverly's Motion to Exclude Extrinsic Materials.

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[1] *Beverly Enterprises, Inc. and Donald L. Dotson v. Service Employees International Union, Local 585* (Case No. 97-2356, W.D. Pa.) was consolidated with the Trump case, and the case number for the Trump case includes the consolidated case. (J.A., p. 326).

## IV. STATEMENT OF FACTS

### A. TRUMP MAKES DEFAMATORY STATEMENTS AT THE DOLE/KEMP RALLY AT POINT STATE PARK FALSELY ACCUSING DOTSON OF CRIMINAL CONDUCT AND ANTI-SEMITISM

On Sunday, August 18, 1996, a large crowd gathered for a political rally in Point State Park in downtown Pittsburgh in support of then-presidential candidate Bob Dole and his running mate, Jack Kemp. (Complaint, J.A., p. 15, ¶ 30). Appellant Dotson attended the rally, where he was approached by the President of SEIU, Local 585, Rosemary Trump. Trump ascertained that Dotson was with Beverly, ascertained Dotson's identity and inquired as to whether Dotson knew who she was. Trump became visibly upset and irate when Dotson said that he did not know who she was. (Complaint, J.A., p. 15, ¶31).

Trump told Dotson that he should have known who she was and then identified herself as the president of SEIU Local 585. Unprovoked, Trump then began to berate Dotson in a loud and angry voice, easily overheard by other people in the crowd. Trump accused Dotson of being a "criminal" and said that, "You people at Beverly are all criminals." Dotson attempted to respond to Trump's loud accusations, but was cut off by Trump, who accused Dotson of "devoting [his] entire career to busting unions." She then shouted at Dotson, "I know your kind. You're just part of that World War II generation that danced on the graves of Jews." (Complaint, J.A., p. 15, ¶¶32-34).

Dotson and Beverly's Complaint alleged that Trump's statements concerning Dotson were false and defamatory and imply false and defamatory facts concerning both Dotson and Beverly. The "gist" or "sting" of Trump's defamation against Dotson is that he is anti-Semitic, that he is a criminal and that he has devoted his entire professional career (part of which was spent as Assistant Secretary of the U.S. Department of Labor for Labor-Management Relations and Chairman of the National Labor Relations Board) to illegal and criminal conduct the purpose of which is to "bust" unions. (Complaint, J.A., pp. 15-16, ¶¶35-36). Dotson and Beverly further alleged that Trump made these statements with actual malice; that they were not privileged; and that, as a result of Trump's malicious and defamatory statements, Dotson has suffered damage to his reputation and good name. (Complaint, J.A., p. 16, ¶¶37-41).

## B. TRUMP MAKES DEFAMATORY STATEMENTS AT THE "TOWN HALL" MEETING FALSELY ACCUSING DOTSON AND BEVERLY OF A CRIMINAL CONSPIRACY

The SEIU orchestrated and persuaded several members of the minority Democratic party of the U.S. Congress to whom it had given financial contributions and other support in the past to attend a "Town Hall" meeting in the Allegheny County Courthouse to hear unsworn statements concerning H.R. 1624, the Federal Procurement and Assistance Integrity Act, a bill proposed by the ranking minority member of the House Veterans' Affairs Committee. Extensive preparation for and invitations to the meeting had been issued long before the bill was introduced. In fact, the bill was introduced in Congress only four days prior to the "Town Hall" meeting. (Exhibit A-1 to Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss, J.A., p. 179). The Complaint alleged that the true purpose of this "Town Hall" meeting was to provide a forum designed solely to attack Beverly and assist the SEIU in its corporate campaign[2] to cause economic harm to Beverly and its nursing homes in Pennsylvania. (Complaint, J.A., pp. 16-17, ¶¶43-44).

The "Town Hall" meeting was not an official Congressional hearing, but was merely given the surface trappings of one to mislead the public. It was no more than a political event organized by the SEIU and attended by several members of the minority party in Congress to further the interests of the SEIU against Beverly by publicly attacking Beverly's business reputation. Its real purpose was to create a forum to "bash" Beverly with impunity under the guise of hearing statements from speakers selected by the SEIU on H.R. 1624 and its effect on Beverly's existing contracts with the Veterans Administration. (Complaint, J.A., p. 17, ¶45).

Appellee Trump was one of the speakers during the "Town Hall" meeting. She delivered a statement and then responded to questions from the Congressional members in attendance. Among the questions and answers given by Trump was the following:

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[2]The term *corporate campaign* "encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Food Lion v. United Food & Commercial Workers Union*, 103 F.3d 1007, 1014, fn. 9 (D.C. Cir. 1997).

> CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?

Trump ignored the question and, much as she did at the Dole/Kemp rally, proceeded to launch an out-of-the-blue, ad hominem attack on Dotson:

> MS. TRUMP: Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, twenty of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new chairman of the National Labor Relations was appointed, the former chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government* and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former General Counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple effect in the entire industry and the whole industry will operate non-union.

(Complaint, J.A., pp. 17-18, ¶¶47-48). (emphasis added).

As the Complaint alleges, the "gist" or "sting" of Trump's defamatory statements at the "Town Hall" meeting is that Appellant Dotson negotiated for employment with Beverly while he was Chairman of the NLRB, in criminal violation of federal ethics laws, and that Dotson, following his departure from government employment, engaged in criminal activities prohibited by federal ethics laws, and violated the canon of ethics governing attorney conduct, by representing Beverly in matters that had been pending before the NLRB during his chairmanship. The "gist" or "sting" of Trump's statements concerning Appellant Beverly is that Beverly itself engaged in, and/or aided and abetted, a criminal conspiracy

by helping Dotson to engage in criminal activities in violation of federal ethics laws. (Complaint, J.A., p. 18, ¶¶49-50).[3]

The truth of the matter is that neither Dotson nor Beverly engaged in any criminal activity as alleged by Trump. (Complaint, J.A., pp. 15-16, 18, ¶¶35, 36, 51). Specifically, neither Dotson nor Beverly committed any action in violation of the Ethics in Government Act. Trump alleged that after President Clinton's election in 1992, Dotson decided to leave the NLRB and that Dotson and Beverly criminally conspired to have Dotson work for Beverly immediately after his term as Chairman of the National Labor Relations Board on NLRB cases that were pending while Dotson was Chairman. Actually, Dotson entered private law practice *after his term as Chairman ended in 1987 — before President Bush was elected, let alone President Clinton*. He continued in private practice until 1992 when he accepted a position with Beverly. Dotson has never represented Beverly in any matter before the NLRB that was pending while he was Chairman, and he had no contact with Beverly at all, never mind employment or possible employment, until long after the post-employment federal restrictions had expired.

As alleged in the Complaint, these statements by Trump at the "Town Hall" meeting are false and defamatory and accuse both Dotson and Beverly of criminal conduct, making them defamatory *per se* under Pennsylvania law. Dotson and Beverly's Complaint further alleged that the statements were made with actual malice, were not privileged and were understood by the recipients of the statements to be of and concerning Dotson and Beverly. Dotson and Beverly also alleged that Beverly and Dotson have sustained damage to their reputations and good names as a result of Trump's statements. (Complaint, J.A., pp. 18-19, ¶¶52-57).

### C. THE DISTRICT COURT GRANTS TRUMP'S MOTION TO DISMISS BY RELYING UPON EXTRINSIC EVIDENCE

No discovery has occurred in the case.[4] Instead, Appellee Trump filed a Motion to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (J.A., p. 44). Trump

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[3]Dotson and Beverly's Complaint sets out in great detail the federal ethics laws which are invoked by Trump's allegations. (Complaint, J.A. pp. 12-14, ¶¶23-24).

[4]Dotson and Beverly served written discovery upon the SEIU which, instead of responding, filed a Motion to Stay Discovery. This Motion was also never ruled upon by the District Court.

claimed that her statements at the Dole/Kemp rally were not capable of a defamatory meaning, but were merely vigorous epithets uttered in the heat of a labor dispute.

With regard to her statements at the "Town Hall" meeting, Trump claimed that she was entitled to absolute immunity since those statements were made at an official legislative proceeding. In support of this argument, Trump submitted materials outside the pleadings for the District Court to consider, including an affidavit from a legislative aide asserting that the purpose of the "Town Hall" meeting was to consider legislation recently introduced in Congress which would allow the federal government to debar contractors with a history of labor law violations. Trump requested that her Motion be converted to a motion for summary judgment, and that Dotson and Beverly be given notice and an opportunity to discover and present Civil Rule 56 evidence in rebuttal to the extrinsic materials submitted by Trump in support of her Motion. (Memorandum in Opposition to Motion to Exclude Extrinsic Materials, J.A., pp. 284-285).

Dotson and Beverly responded to Trump's Motion to Dismiss in two ways. *First*, Dotson and Beverly filed a Motion to Exclude Extrinsic Evidence which asked the Court not to consider the extrinsic materials submitted by Trump, but to instead determine, pursuant to universally applied Rule 12(b)(6) standards of review, whether Dotson and Beverly's Complaint was legally sufficient. (J.A., p. 120). In the alternative, Dotson and Beverly's Motion requested that the District Court convert Trump's Motion into a motion for summary judgment under Rule 56, and give Dotson and Beverly notice of the conversion and an opportunity to engage in discovery on the issue of legislative immunity.

*Second*, Dotson and Beverly filed a Brief in Opposition to the Motion to Dismiss. (J.A., p. 120). As exhibits to their Brief in Opposition, Dotson and Beverly submitted verified copies of:

1. A Bill Tracking report for H.R. 1624 showing the three House committees to which it had been referred;

2. 1997 hearing schedules for those committees showing that no hearings or field hearings had been held on H.R. 1624; and,

3. Rule XI of the Rules of the House of Representatives for the 105th Congress which clearly provides that no House committee may take testimony or receive evidence unless at least two (2) members of the Committee are present.

(Exhibits A-1, 2 & 3 to Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss, J.A., pp. 179-236). These materials demonstrated conclusively that no members of the three relevant House committees to which H.R. 1624 has been assigned were even present at the "Town Hall" meeting and that, six months after introduction of the bill, no action had been taken, nor any hearings scheduled, by any of the committees or subcommittees to which the bill had been assigned. (Exhibit A-2 to Brief in Opposition, J.A., pp. 186-206).

The District Court never ruled upon Dotson and Beverly's Motion to Exclude Extrinsic Evidence. Nor did the District Court convert Trump's Motion to Dismiss into one for summary judgment as requested by the parties. Instead, the District Court considered materials outside the pleadings submitted by Trump, declined to consider the extrinsic evidence submitted by Dotson and Beverly, and concluded that Dotson and Beverly's Complaint failed to state a viable claim for relief. The District Court held that Count I of Dotson and Beverly's Complaint should be dismissed because the statements made by Trump at the Dole/Kemp rally accusing Dotson of criminal conduct and anti-Semitism "were mere hyperbole and insulting rhetoric that are unfortunately commonplace in labor disputes" and are never capable of a defamatory meaning. (Memorandum Opinion, pp. 3-5). Count II of Dotson and Beverly's Complaint was dismissed based upon the Court's holding that the "Town Hall" meeting was a true legislative proceeding and that, therefore, Trump was entitled to absolute immunity for any statements she made concerning Dotson and Beverly at the meeting. (Memorandum Opinion, pp. 6-11).

## V. STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously, and the only related case, *Beverly Entr. Inc. v. Bronfenbrenner*, Third Circuit Case No. 98-3369, was recently dismissed voluntarily.

## VI. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

This is an appeal from the District Court's Order granting Trump's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6). Therefore, this Court conducts a plenary review over the District Court's Order dismissing Dotson and Beverly's Complaint under Fed. R. Civ. P. 12(b)(6). The

standard of review in this matter was summarized by this Court in *Alexander v. Whitman*, 114 F.3d 1392, 1397-98 (3rd Cir. 1997):

> We exercise plenary review over a district court's order dismissing a complaint under Fed.R.Civ.P. 12(b)(6). *Moore v. Tartler*, 986 F.2d 682, 685 (3rd Cir. 1993). We must determine if plaintiff may be entitled to relief under any reasonable reading of the pleadings, *Holder v. City of Allentown*, 987 F.2d 188, 193 (3rd Cir. 1993), assuming the truth of all factual allegations in the complaint. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3rd Cir. 1992). A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984). (footnote omitted).

*Id.*

Accordingly, this Court acts *de novo* to determine if it is possible for Dotson and Beverly to be entitled to relief while assuming all factual allegations in the Complaint to be true.[5] Even if the District Court had treated Appellee Trump's Motion as a motion for summary judgment, this Court's *de novo* standard of review for an appeal of a granting of summary judgment remains the same. *Alexander v. Whitman, supra*, at 1398, fn. 7.

## VII. SUMMARY OF ARGUMENT

The decision of the District Court in this case undermines the ability of individual citizens to protect the reputational interests guaranteed them by the Constitution of the Commonwealth of Pennsylvania. According to the District Court, statements made by voluntary, unsubpoenaed and unsworn "witnesses" at political events are entitled to absolute immunity for even the most vicious falsehoods. As long as legislators are present and the meeting has some pseudo-characteristics of an information-gathering or

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[5]Despite considering evidence outside of the pleadings provided by Defendants, the District Court continued to treat Defendant's Motion as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Memorandum Opinion, pp. 3, 14). When previously reviewing an appeal from an earlier Judge Lancaster decision that is similar procedurally to what he did in this case, this Court ignored the extrinsic evidence considered by Judge Lancaster and treated the matter solely as a Rule 12(b)(6) motion. *Independent Enterprises v. Pittsburgh Water*, 103 F.3d 1165 (3rd Cir. 1997).

fact-finding activity, it is of no moment that the defamatory statements bear no relation to the purpose of the meeting. Further, according to the District Court's view, citizens who are falsely accused of anti-Semitism, criminal conduct, racism and bigotry in the Commonwealth of Pennsylvania have no redress because some (but not all) prior decisions issued by courts in different and earlier times have found that labeling someone a criminal, a racist or an anti-Semite is incapable of a defamatory meaning when uttered in the course of a labor dispute.

The most troubling aspect of the District Court's pronouncements is that they come in a case where no discovery has been conducted and no factual record is present to support the Court's conclusions. Thus, without considering any evidence regarding the underlying motivations of the participants and organizers of the "Town Hall" meeting, the District Court somehow found it appropriate to conclude as a matter of law that the meeting was a true "legislative proceeding," and that no statements made by any speaker at the meeting, not even knowing and blatant falsehoods unrelated to the meeting's purpose, could serve as the basis for a defamation action. Likewise, the Court concluded that it needed no record evidence regarding the understanding and the reaction of those in attendance at the Dole/Kemp political rally to conclude as a matter of law that no one would have taken Trump's statements about Appellant Dotson's alleged criminal conduct and anti-Semitism seriously.

Not only has the District Court significantly eroded the protection afforded reputational interests in the Commonwealth of Pennsylvania, but it has done so by trampling on the procedural rights guaranteed injured parties by the Federal Rules of Civil Procedure. Motions to dismiss are to be granted only in those rare circumstances when it is beyond doubt that no set of facts could exist to support the claims made. Well-pleaded factual allegations of an injured party's complaint are to be taken as true, and matters outside the pleadings are *not* to be considered unless the non-movant is at least afforded the opportunity to engage in discovery so as to uncover evidence to refute those matters. Both parties in this case acknowledged those standards and procedures, and requested that the Court abide by them. The District Court, however, deemed them unnecessary, all to Dotson and Beverly's great detriment.

Dotson and Beverly submit that the District Court went too far. It went too far in significantly undermining a defamed party's ability to redress injury to his reputation, especially in a state where a person's interest in his reputation is placed in the same constitutional category as

interests in life, liberty and property. And, it went too far in derogating Dotson and Beverly's rights under the Federal Rules of Civil Procedure to be given an opportunity to develop a factual record in support of their claims. It is now up to this Court to ensure that Dotson and Beverly are afforded the opportunity generally provided in Pennsylvania to seek redress for their reputational injuries.

## VIII. LAW AND ARGUMENT

### A. TRUMP IS NOT ENTITLED UNDER RELEVANT PENNSYLVANIA PRECEDENT TO ABSOLUTE IMMUNITY FOR HER STATEMENTS AT THE "TOWN HALL" MEETING ACCUSING APPELLANTS DOTSON AND BEVERLY OF CRIMINAL CONDUCT

#### 1. Appellee Trump's Statements Do Not Quality For An Absolute Legislative Privilege Under Pennsylvania Law

Appellee Trump's statements do not qualify for an absolute privilege under Pennsylvania law because her statements fail to meet the requirements of Section 590A of the Restatement 2d of Torts adopted by the Pennsylvania courts. See, *Jennings v. Cronin*, 256 Pa. Super. 398, 389 A.2d 1183 (1978). The Restatement 2nd of Torts provides:

> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

The District Court's ruling allowing absolute privilege for Trump's statements is erroneous because: 1) Trump's statements were defamatory; 2) the May 19, 1997 "Town Hall" meeting was not a legislative proceeding; 3) Trump's statements were not communications preliminary to a legislative proceeding; and, 4) even assuming that the "Town Hall" meeting was a legislative proceeding or that Trump's statements were actually communications preliminary to the proceeding, Trump's statements had no relation to the claimed purpose of the meeting.

#### 2. Appellee Trump's Statements At The "Town Hall" Meeting That Dotson And Beverly Had Engaged In Criminal Activities Prohibited By Federal Ethics Laws Are Capable Of A Defamatory Meaning

At the "Town Hall" meeting, Appellee Trump accused Appellant Donald Dotson of committing acts that constitute criminal violations of federal ethics laws. Specifically, Trump accused Dotson of negotiating for employment with Appellant Beverly during his tenure as Chairman of the NLRB, and she accused Dotson of representing Beverly in matters that had been pending before the NLRB during his chairmanship. Both of these actions, if true, would be criminal violations of the Ethics in Government Act, which is codified in part at 18 U.S.C. §207, 208 and 216. Violations of the Ethics in Government Act are felonies, punishable by up to five years imprisonment for a willful violation and a fine up to $50,000. The accusations that Beverly and Dotson engaged in these criminal activities were made without privilege and without protection. In addition, Trump's statements were deliberately publicized to the general public, the media and to members of Congress. Also, Trump accused Beverly of engaging in and/or aiding and abetting in a criminal conspiracy by helping Dotson to engage in these criminal activities in violation of the Ethics in Government Act.

Trump's accusations against Dotson and Beverly are defamatory *per se* under applicable Pennsylvania law. *Marcone v. Penthouse*, 754 F.2d 1072 (3rd Cir. 1985), citing *Baird v. Dun & Bradstreet*, 446 Pa. 266, 274, 285 A.2d 166, 171 (1971) ("Statements imputing the commission of an indictable offense are capable of defamatory meaning as a matter of law"). By disposing of Count II in the Complaint on the legislative immunity issue, the District Court declined to reach a conclusion as to the legal sufficiency of the claims in Count II of the Complaint. Had the District Court addressed the legal sufficiency of the claims in Count II of the Complaint, the Court would have held that the Complaint stated legally sufficient claims and, accordingly, the Motion to Dismiss would have been denied.

3. Appellee Trump's Defamatory Statements About Dotson And Beverly Were Not Made At A Legislative Proceeding

The "Town Hall" meeting was not a legislative proceeding. It is undisputed that the informal meeting organized by the SEIU did not have any sworn testimony. Also, as alleged in the Complaint, the meeting was not an official Congressional hearing. After Appellee Trump submitted extrinsic evidence she believed supported her contention that the meeting was a legislative proceeding, Dotson and Beverly submitted extrinsic evidence that this meeting was nothing more than an informal event organized by the SEIU as part of its corporate campaign and only made to

look official. Specifically, Dotson and Beverly submitted convincing evidence that:

1. The meeting was not sanctioned by a single committee or subcommittee of the United States Congress;
2. The meeting was not an official Congressional committee hearing as contemplated by the Rules of the House of Representatives;
3. Congressional schedules did not list the meeting as an official field hearing, committee hearing or subcommittee hearing;
4. The required number of Congressional committee members were not present to constitute an official hearing on the bill alleged to be the focal point of the meeting; and
5. None of the Congressional attendees were even members of the committee or subcommittees involved with the bill.

As this Court aptly stated in *Government of the Virgin Islands v. Lee*, 775 F.2d 514 (3rd Cir. 1985), legislative immunity does not extend to all activities that may have "some nexus to the legislative function" or are only "casually or incidentally" related to legislative affairs. *Id.*, at 520 citing *United States v. Brewster*, 401 U.S. 501, 528 (1972). A review of the facts relating to the purpose and organization of the meeting reveals that the meeting had no actual nexus to a legislative function. The District Court's review of this issue: 1) Did not accept the facts alleged in the Complaint as true; and, 2) accepted extrinsic evidence submitted by Appellee Trump while refusing to accept the extrinsic evidence submitted by Dotson and Beverly. Had the District Court either reviewed the legal sufficiency of the allegations in the Complaint as it was required to do, or reviewed extrinsic evidence submitted by *both* parties as would have occurred in a Rule 56 conversion, the Court would have concluded that the "Town Hall" meeting was not a true legislative proceeding which entitled Appellee Trump to absolute privilege concerning her defamatory statements.

a. The District Court improperly failed to accept the facts alleged in the Complaint as true in determining that the "Town Hall" meeting was a legislative proceeding

The issue of legislative immunity in this case turns not on what was said and who was present at the "Town Hall" meeting, but whether the "Town Hall" meeting was a true legislative proceeding or, instead, merely a partisan meeting orchestrated by the SEIU during an acrimonious labor

dispute as part of its "corporate campaign" against Beverly in Pennsylvania. The Complaint specifically alleged that the "Town Hall" meeting was the brainchild of the SEIU; that it was organized by the SEIU; and that the SEIU persuaded some friendly members of Congress to attend to lend an air of officiality to the proceeding. In essence, the Complaint alleged that the "Town Hall" meeting was a union-organized activity without a legitimate legislative purpose. These well-pleaded factual allegations directly contradict the District Court's holding and required a denial of Trump's Motion to Dismiss.

Complaints are not to be dismissed pursuant to Rule 12(b)(6) unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Complaint is to be viewed in the light most favorable to the plaintiff, with all well-pleaded factual allegations taken as true. *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3rd Cir. 1994). All reasonable inferences are also to be drawn in the plaintiff's favor. *Gordon v. Lancaster Osteopathic Hospital Ass'n.*, 340 Pa. Super. 253, 489 A.2d 1364 (1985); *Parano v. O'Connor*, 433 Pa. Super. 570, 641 A.2d 607 (1994).

The District Court clearly failed to apply these standards in reviewing Trump's Motion to Dismiss. If the allegations in the Complaint regarding the SEIU's role in organizing and supporting the "Town Hall" meeting are true, then at least a factual issue has been raised regarding whether the meeting could possibly be considered a true legislative proceeding, and whether Appellee Trump's false and defamatory statements about Dotson and Beverly are eligible for absolute legislative immunity. The District Court, however, disregarded these key factual allegations, and concluded merely from viewing a videotape of the "Town Hall" meeting that it met the criteria for a legislative proceeding.

The District Court observed that it was not bound to take the allegations in Dotson and Beverly's Complaint that the "Town Hall" meeting was not a legislative proceeding as true because the allegation was a legal conclusion and not a factual allegation. (Memorandum Opinion, p. 10). This observation, however, completely overlooks *the factual allegations upon which the legal conclusion was based*, i.e., that the "Town Hall" meeting was organized by the SEIU as part of its "corporate campaign" against Beverly, the primary purpose of which was to aid the SEIU in swaying public opinion in Pennsylvania against Beverly and to cause it economic harm. Dotson and Beverly are not asserting to this Court

that the District Court should have accepted any legal conclusions set forth in their Complaint as true, but only that the District Court was required to accept their well-pleaded factual allegations as true and to draw all reasonable inferences in Dotson and Beverly's favor, especially in considering a Motion to Dismiss where the Court did not give Dotson and Beverly an opportunity to rebut the extrinsic materials submitted by the movant and relied upon by the Court.

Nothing in the videotape of the "Town Hall" meeting could rebut the allegations in the Complaint that the meeting was no more than an SEIU-orchestrated opportunity to bash Beverly, during an acrimonious labor dispute as part of its "corporate campaign" against Beverly in Pennsylvania, in which the appearance of Congressional representatives was arranged by the SEIU to give it an air of officiality.[6] By drawing all reasonable inferences in Dotson and Beverly's favor, the District Court would have reached the inescapable conclusion that, at the very least, discovery into the means and methods and motives of those organizing the meeting was necessary to establish an appropriate record concerning the issues raised by the Complaint and whether the legislative immunity defense was properly available to Trump in this case at all.

Thus, not only did the District Court ignore the mandatory provisions of Rule 12(b) of the Federal Rules of Civil Procedure by relying upon extrinsic materials submitted by Trump, without giving Dotson and Beverly the opportunity to respond with Rule 56 evidence, but the Court also failed to apply the appropriate analytical standards in reviewing Trump's Motion to Dismiss. This case must be remanded so as to allow Dotson and Beverly the opportunity to exercise the discovery rights afforded them pursuant to the Federal Rules of Civil Procedure.

b. The District Court improperly considered only extrinsic evidence submitted by Trump and refused to consider extrinsic evidence offered by Dotson and Beverly in determining that the "Town Hall" meeting was a legislative proceeding

[6]A key factor in the District Court's decision that Trump's statements at the Dole/Kemp rally were not actionable was the existence of an ongoing labor dispute between the parties. In the Court's analysis of the "Town Hall" statements, however, there is no similar recognition that an ongoing labor dispute existed at the time and that the SEIU's orchestration of an event like the "Town Hall" meeting was a perfect vehicle for Trump and the SEIU to affect public opinion in their favor.

The Complaint filed by Dotson and Beverly in the District Court clearly alleges that the "Town Hall" meeting was not a legitimate legislative proceeding, but instead was a partisan union event organized by the SEIU as part of its "corporate campaign" against Beverly. Rather than allow Dotson and Beverly to develop an adequate factual record in support of these allegations, the District Court merely viewed a videotape of the "Town Hall" meeting and concluded that the meeting had a legitimate legislative purpose. Even the precedent primarily relied upon by the District Court required it to do much more.

Because neither the Pennsylvania Supreme Court nor this Circuit has previously defined "legislative proceeding" for purposes of applying the privilege set forth in Restatement 2d of Torts, Section 590A, the District Court relied by analogy on *Government of the Virgin Islands v. Lee, supra*. At issue in that case, however, was the applicability of the Speech and Debate Clause of the U.S. Constitution to a legislator's fact-finding activities. Based on *Lee*, the District Court concluded that because the "Town Hall" meeting was "conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation," absolute legislative immunity for all witnesses at the meeting was appropriate. (Memorandum Opinion, p. 8).

The District Court's inquiry into whether the "Town Hall" meeting was within the sphere of legitimate legislative activities which are eligible for absolute immunity was clearly inadequate under the standards set forth by this Court in *Lee*:

> Although [a legislator] maintains that his meetings and conversations were official in nature and did involve information-gathering, such assertions cannot preclude a court of competent jurisdiction from determining whether [a legislator's] conversations were, in fact, legislative in nature so as to trigger the immunity.

*Government of the Virgin Islands v. Lee, supra* at 522. In *Lee*, although this Court held that legislative fact-finding is entitled to legislative immunity as a general matter, it reversed the District Court's finding that the Speech and Debate Clause precluded any inquiry into the purpose or motivation of the legislator's purportedly legislative trip. In reaching that decision, the *Lee* Court cited the Supreme Court's decision in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) where it was held that the investigative activities of Congress are entitled to legislative immunity only "once it is determined that members are acting within the 'legitimate

legislative sphere.' " *Eastland, supra* at 503, quoting *Doe v. McMillan*, 412 U.S. 306, 314 (1973). Quoting another decision of the U.S. Supreme Court, this Court found that "[t]he immunity, however, does not prohibit inquiry into a legislature's activities simply because the activities have 'some nexus to the legislative functions,' or 'casually or incidentally relate [ ] to legislative affairs.' " *Lee, supra*, at 520, citing *United States v. Brewster, supra* at 528.

The District Court's investigation in this case was limited to a review of an unauthenticated videotape of the "Town Hall" meeting submitted by Trump. The Court apparently concluded that, because members of Congress were present, the meeting could be considered a legitimate legislative proceeding with no further factual inquiry required or permitted. The District Court, however, either ignored or discounted all facts alleged and presented by Dotson and Beverly, including the fact that none of the witnesses, including Appellee Trump, were subpoenaed or sworn to give testimony under oath at the "Town Hall" meeting, and that not one of the Congressional representatives present was a member of the committees or subcommittees assigned to review and report on the legislation at issue. The District Court was apparently of the opinion that any facts relating to the purpose and organization of the "Town Hall" meeting were irrelevant to determining whether it was a legitimate legislative proceeding. Certainly, the District Court's inquiry fell far short of what was required under *Lee*.[1]

Clearly, the proposition for which *Lee* stands is that while legislative immunity may protect legislators' fact-finding and investigative activities, there must be a *factual* inquiry into whether the activity in question is properly viewed in law as a legitimate legislative activity or as something else. The burden was on Trump to show more than just "some nexus to legislative functions" or a "casual or incidental relationship to legislative

[1] The District Court's reliance on *Government of the Virgin Islands v. Lee* was misplaced for a number of other reasons as well. Pennsylvania law was not at issue. At issue in that case was a criminal indictment against a Virgin Islands legislator for allegedly misrepresenting a personal trip to Washington, D.C. and New York City as a legislative fact-finding trip and seeking reimbursement from the government on those grounds. Thus, a key distinction between *Lee* and the instant case is that *Lee* analyzed the immunity provided legislators under the Speech and Debate Clause of the United States Constitution, and not under the immunity provided to testimonial witnesses in legislative proceedings under Section 590A of the Restatement 2d of Torts.

affairs." The District Court, however, considered only evidence submitted by Trump, ignored the well-pleaded factual allegations of the Complaint and dismissed out-of-hand any facts submitted by Dotson and Beverly which did not support its conclusion. Thus, even if *Lee* was directly applicable (which it is not), the District Court's failure to allow any meaningful *factual inquiry* falls short of the standard required by the Court's decision in *Lee*.[8]

The "Town Hall" meeting held in Pittsburgh on May 19, 1997 was part of the SEIU's overall plan to bring public pressure to bear on Beverly during the course of its collective bargaining negotiations with the SEIU in Pennsylvania. The local Congressmen who participated were able to parlay their participation into a valuable photo opportunity, as the SEIU's publicity machine guaranteed media coverage, including local cable television broadcasts. Clearly, material issues of fact exist regarding whether or not the "Town Hall" meeting was merely a politically motivated event with, at most, a casual or incidental relationship to legitimate legislative affairs. Dotson and Beverly must be provided the opportunity to rebut the extrinsic materials relied upon by the District Court, and discover Rule 56 evidence in support of their claims.

4. Appellee Trump's Defamatory Statements About Dotson And Beverly Were Not Communications Preliminary To A Legislative Proceeding

Because it found that the "Town Hall" meeting was a legislative proceeding, the District Court did not analyze whether Trump's statements about Dotson and Beverly at the "Town Hall" meeting would qualify as communications preliminary to a legislative proceeding, which are also

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[8]The District Court relied upon two other cases to support its holding that the "Town Hall" meeting was a legislative proceeding, even though the question of what constituted a legislative proceeding was not raised in either. In *Yip v. Pagano*, 606 F. Supp. 1566 (D. N.J. 1985), the allegedly defamatory statements were made during a formal hearing conducted by the House Subcommittee on Crime, eliminating any question that the meeting at issue was a legislative proceeding. This was also true in *Lunderstadt v. Colafella*, 885 F.2d 66 (3rd Cir. 1989), where the plaintiff's claims involved statements and activities of a member of a Select Committee of the Pennsylvania House of Representatives, the Select Committee's counsel and its investigator.

afforded absolute immunity under Restatement 2d of Torts, Section 590A. An analysis of the facts reveals that Trump's statements do not so qualify.[9]

To qualify for immunity as a communication preliminary to a legislative proceeding, the party claiming the privilege has the burden to show that the communication was related "to any actual or seriously contemplated legislative proceedings." *Robertson v. McCloskey*, 666 F. Supp. 241 (D. D.C. 1987). In *McCloskey*, the Court found that witnesses' statements solicited by legislators are not always privileged, especially in the absence of the pendency of legislative proceedings. *Id.* at 247, n. 2. Thus, Trump's burden was to demonstrate that the legislature was "seriously contemplating" legislative proceedings on the issues addressed by her statements to qualify for immunity as a communication preliminary to a legislative proceeding.

Trump did not, and could not, meet that burden. Materials submitted by Dotson and Beverly in opposition to Trump's Motion to Dismiss demonstrated that the legislation in question (H.R. 1624) had been introduced into Congress only four days prior to the "Town Hall" meeting. Even six months later, no action had been taken or hearing held on the bill by any committee or subcommittee to which it had been referred. Thus, it appears that the only activity regarding the bill at the time of the "Town Hall" meeting was its use by the SEIU and some local Congressmen as a springboard for a media event, for, at the time of the "Town Hall" meeting, there were no seriously contemplated legislative proceedings to address H.R. 1624.

5. Appellee Trump's Defamatory Statements About Dotson And Beverly Were Not Related To The Purpose Of The "Town Hall" Meeting

To qualify for absolute immunity under Section 590A of the Restatement 2d of Torts, whether as statements at a legislative proceeding or as communication preliminary to a legislative proceeding, the statements

[9]In its decision, the District Court ignored, without comment, that Trump had abandoned her argument in the District Court that the "Town Hall" meeting was a legislative proceeding. Instead, Trump argued that those statements were entitled to absolute immunity as communications *preliminary* to a legislative proceeding. "Trump *never asserted that the field hearing or town meeting was a formal hearing* . . . thus, the only question is whether the statements were preliminary to a legislative proceeding." (Trump's Reply Memorandum in Support of Motion to Dismiss, J.A. at p. 250). (emphasis added).

at issue must be related to the legitimate legislative purpose of the proceeding or contemplated proceedings. In *Webster v. Sun Co., Inc.*, 731 F.2d 1 (D.C. Cir. 1984), affirmed after remand, 790 F.2d 157 (D.C. Cir. 1986), the Court set forth a 2-part test to establish a relationship between the statements and the legislative purpose of the hearing:

> First, the communicator must show that he would not have made the unsolicited statement but for his intention to inform the legislative body *on a subject properly within its jurisdiction*. Second, the statement must have *some relation to the legitimate legislative business* to which it is addressed.

*Id.* at 11 (footnote omitted). (emphasis added). Clearly, the statements at issue in this case had no relation to any legitimate legislative business.

The District Court found that the purpose of the "Town Hall" meeting "was to allow local members of Congress to hear testimony regarding the utility of H.R. 1624, . . . and how adoption of H.R. 1624 might affect Beverly's operations." (Memorandum Opinion, pp. 8-9). Trump's statements from the "Town Hall" meeting upon which this lawsuit is based had nothing to do with H.R. 1624. Instead, they consisted of personal attacks against Beverly Vice President Don Dotson and allegations that he had illegally solicited his job with Beverly while still at the NLRB, and that Beverly had hired him immediately from his position as Chairman of the NLRB to take advantage of his knowledge of Beverly cases which had been pending before the NLRB during his tenure as Chairman, all in criminal violation of federal ethics laws.

Statements about the circumstances under which Dotson came to be employed by Beverly have no bearing on whether a law should be passed barring alleged labor law violators from contracting with the federal government. Trump's statements were nothing more than an *ad hominem* attack on Appellant Dotson's ethics and professionalism and an assault on Appellant Beverly's business reputation, both completely unrelated to any proposed legislation. Thus, such statements are clearly outside the scope of the legislative privilege provided for in the Restatement 2d of Torts, Section 590A.

### B. PENNSYLVANIA COURTS HAVE NEVER AFFORDED ABSOLUTE IMMUNITY TO VOLUNTARY, UNSWORN STATEMENTS MADE INFORMALLY TO LEGISLATORS

Pennsylvania courts have applied Section 590A of the Restatement 2d of Torts in holding that defamatory statements made under oath by

witnesses subpoenaed to testify before a legislative body are absolutely privileged. But Pennsylvania courts have never been presented with a fact situation like the one in this case involving voluntary, unsworn statements made informally to a group of legislators. Other states have been presented with such fact situations and have chosen not to stretch the limits of Section 590A to such a great extent. At a minimum, the District Court was required to forecast what Pennsylvania courts would do when faced with a novel issue, and to make this forecast based on a variety of factors, including the high value which the Pennsylvania Constitution places on reputation. The District Court did not do so, barely considering any Pennsylvania case law, and the Pennsylvania Constitution not at all.

1. Federal Courts Must Use Their Best Judgment In Interpreting Unsettled Issues Under State Law

Pennsylvania courts have never addressed whether or not absolute legislative immunity should be extended to voluntarily, unsworn defamatory statements made informally to legislators. Under these circumstance, federal courts must use their best judgment to forecast how the Pennsylvania Supreme Court would resolve the issue. *Clark v. Modern Group, Ltd.*, 9 F.3d 321, 326 (3rd Cir. 1993). In doing so, they "must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data . . ." *Travelers Indemnity Company of Illinois v. DiBartolo*, 131 F.3d 343 (3rd Cir. 1997), citing *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 663 (3rd Cir. 1980).

Federal courts are also free to abstain and certify this question to the Pennsylvania Supreme Court. As long as this Court's decision would not needlessly conflict with the internal affairs of the Commonwealth of Pennsylvania, however, invoking the doctrine of abstention is not justified. *Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative*, 583 F.2d 104 (3rd Cir. 1978). There is no reason to believe that a decision in this case would do so. The fact that an issue has not been fully resolved in the state courts is not a basis, in and of itself, to justify delaying the proceedings to certify a question to the state courts. *See, e.g., Travelers Indemnity Company, supra at* 348; *Jim White Agency Company v. Nissan Motor Corporation*, 126 F.3d 832 (6th Cir. 1997). Although this case may present a novel issue of state law that presents some difficulty or involves some technical issues, that is not a sufficient basis for this Court to relinquish diversity jurisdiction. *Baltimore Bank Cooperatives, supra*, at 111, citing *Louisiana Power & Light Company v. Thibodaux*, 360 U.S. 25, 27 (1958). Hence, it is the responsibility of a federal court to review the

novel legal issues presented in this matter by performing a *de novo* review of the issues presented in this case. *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

For the reasons discussed below, Dotson and Beverly submit that Pennsylvania, having equally favored in its Constitution a person's interest in reputation along with interests in life, liberty and property, would afford no more than a qualified privilege to the defamatory statements made by Trump at the "Town Hall" meeting.

2. Pennsylvania Courts Would Afford No More Than A Qualified Privilege To The Defamatory Statements Made By Trump At The "Town Hall" Meeting

Absolute immunity for statements by witnesses in judicial and legislative proceedings is designed to promote honest and candid statements before such bodies. Expanding the application of such immunity beyond the bounds of *formal* legislative and judicial proceedings, however, can lead to blatantly unjust results.

The facts of this case present a perfect illustration of how an absolute immunity from liability can be abused. Without any fear of punishment for lying, and with no real direction or control exercised by the legislators over her "statements," Appellee Trump was free to maliciously slander Dotson and Beverly with knowing falsehoods unrelated to the purpose of the meeting. Dotson and Beverly submit that the circumstances of this case do not require the application of an absolute privilege in order to promote candid and honest statements to legislators. As a matter of public policy, this Court should not extend absolute testimonial immunity to witnesses, like Appellee Trump, who have not been subpoenaed to testify and who are not sworn under oath prior to giving testimony. A conditional or qualified immunity under such circumstances better balances the competing interests.

The District Court concluded that the definition of a legislative proceeding "is broad enough to encompass proceedings — including informal fact-finding, information-gathering, or investigative activities — that are conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation." (Memorandum Opinion, p. 8). The District Court's Opinion necessarily implies that *any statement* by a witness in a legislative proceeding which is made in response to a question by one of the legislators is absolutely privileged, without any need to examine either the substance of the

question or the content of the response or its relationship to legitimate legislative concerns. In this case, the Court engaged in no examination of Trump's response. Instead, without explanation, the Court found that "The statement that plaintiffs find objectionable was *clearly relevant* to the stated purpose of the meeting; indeed, it was made in direct response to a question posed by Representative Klink." (Memorandum Opinion, p. 11) (emphasis added). Such broad application of absolute immunity with no examination of the statement's content or legislative nexus wholly fails to take into account the reputational interests of the person maliciously defamed, let alone a proper Section 590A analysis.

A number of jurisdictions have found that affording absolute immunity to voluntary witnesses, under circumstances where the witness has not been subpoenaed or sworn under oath to tell the truth, goes too far in protecting the speaker at the expense of the injured party's reputation. *See, e.g., Fiore v. Rogero,* 144 So.2d 99, 103 (Fla. Dist. Ct. App. 1962); *Adserv Corp. v. Lincecum,* 385 So.2d 432, 433, 435 (La. Ct. App. 1980); *Wright v. Lathrop,* 149 Mass. 385, 21 N.E. 963, 966 (Mass. 1889); and, *Bell v. Horton,* 107 Ohio App.3d 824, 669 N.E.2d 546, 549 (Ohio Ct. App. 1995). In each of these cases, the Court found that a conditional or qualified privilege would adequately protect the speaker from frivolous lawsuits and at the same time promote the general policy objective of encouraging honest and candid statements before legislative bodies.

The latest court to conclude that a conditional privilege better balances the interests of the defamer with the interests of the defamed is the Wisconsin Supreme Court. In *Vultaggio v. Yasko,* 215 Wis.2d 325, 572 N.W.2d 450 (Wis. Sup. Ct. 1998), the defendant attended a public meeting of the Whitewater, Wisconsin city council and spoke in opposition to a council proposal to add on to the public safety building so as to increase space for the police and fire departments. The defendant favored an alternative proposal which would have involved refurbishing an abandoned school in her neighborhood. During the course of her statement, the defendant criticized the upkeep of several buildings in her neighborhood owned by the plaintiff. The council meeting at which the defendant appeared was broadcast on local television, and there was no evidence that the defendant had been subpoenaed to testify or that she had been sworn under oath prior to addressing the legislative body.

The Wisconsin Supreme Court refused to extend the absolute privilege afforded in Section 590A of the Restatement 2d of Torts to the defendant's statement under such circumstances:

> We decline the invitation to stretch the absolute privilege to such lengths. '[T]he effect of an absolute privilege is to give lavish support to the social interest in obtaining complete disclosures of facts from witnesses, and to ignore completely the predicament of the maligned and remediless individual whose reputation may be harmed.' Ysrella Weinblatt, Case Note, 15 S. Cal. L. Rev. 276, 277 (1942). We are troubled by the fact that in a situation with little guidance, structure or control for the witness's testimony, an absolute privilege eliminates a defamed citizen's right of redress, despite the falsity of the statements, and the malice or ill will of those who make them.

*Id.* at 336-337.

The Wisconsin Supreme Court considered numerous factors in reaching its decision:

- Rebuttal testimony by the injured party, perhaps at a later meeting, affords little relief, especially when the original testimony has already been broadcast on television.
- The "relate to" requirement of Restatement 2d Section 590A has been construed so liberally so as to provide virtually no real protection to the defamed.
- Unlike judicial proceedings, there is nearly a complete lack of control over the nature and scope of testimony in a legislative proceeding. Not having been sworn under oath, the witness has no fear of punishment for lying. Nor is the witness's testimony controlled by the direction or questioning of the legislative body.

*Id.* at 338-340.

Consideration of exactly these factors in the instant case also militates against affording Appellee Trump an absolute privilege for her voluntary, unsworn statements at the "Town Hall" meeting. And, like the defendant in *Vultaggio*, Appellee Trump was not subpoenaed to testify at the "Town Hall" meeting nor was she sworn under oath to tell the truth prior to speaking. In addition, her statements were not subject to the

direction and control of the legislators in attendance who allowed her to deliver her own statement, i.e., the members of Congress who were present let her say whatever she wanted about Dotson and made no effort to cut her off even though they must have known, being longtime Washington residents, that Dotson left the NLRB before President Bush was elected, let alone President Clinton. And, just as the council meeting in *Vultaggio* was broadcast on television, so was the "Town Hall" meeting, thus affording little relief to Dotson and Beverly through the presentation of rebuttal at a later time.

The Wisconsin Supreme Court used a particularly vivid illustration to support its conclusion that affording an absolute privilege to legislative witnesses under such circumstances does not properly balance the interests of the speaker with the interests of the defamed:

> The following example will help clarify why we are not persuaded: If the Whitewater city council had met that evening to discuss different ways to improve and beautify the city, a city resident would be completely without redress if a witness falsely and maliciously accused the resident of owning and operating a child pornography business, or of selling drugs from his or her home.

*Id.* at 338.

That example is no different from Trump's falsely accusing a former Chairman of the NLRB of committing criminal violations of federal ethics laws in seeking employment. Article I, Section 1 of the Pennsylvania Constitution specifically protects individuals' reputational interests, and places those interests in the same category as life, liberty and property. *Sprague v. Walter*, 518 Pa. 425, 438-439, 543 A.2d 1078, 1084 (1984). Thus, Pennsylvania puts greater weight on protecting reputation than many other states. Yet, in discussing the "Town Hall" meeting statements, the District Court failed to even mention Dotson and Beverly's reputational interests. Indeed, there is no doubt that the District Court's analysis in this case would have afforded the speaker from the Wisconsin Supreme Court's illustration the protections of an absolute testimonial privilege. If this Court were to affirm the District Court's holding, the Third Circuit will have chosen to stretch the absolute privilege afforded under Section 590A of the Restatement 2d of Torts beyond its legitimate outermost boundaries and certainly far beyond anything permitted by the Constitution of the Commonwealth of Pennsylvania. This is not what a Pennsylvania state court would have done. Dotson and Beverly submit that doing so under the

circumstances of this case does not adequately protect the interests of the defamed parties, an interest *constitutionally* protected in Pennsylvania — and the holding reached by the District Court is not necessary to promote honest and candid testimony in genuine legislative proceedings.

Further evidence that Pennsylvania courts would go farther than other states to protect the reputations of Dotson and Beverly is contained in *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984) *rev'd* 475 U.S. 767 (1986). The Pennsylvania Supreme Court held in that defamation case that alleged defamatory material is *presumed* false and that the defendant has the burden of proving the statements are true rather than the plaintiff proving them false. Although the U.S. Supreme Court reversed this decision, placing the burden of proving that the alleged defamatory statements are false on the plaintiff, the Pennsylvania decision illustrates the importance of reputation in the Commonwealth of Pennsylvania and how far its courts will go to protect reputation. In this context, the District Court's disregard for Dotson and Beverly's reputation clearly shows that the Court did not take into consideration Pennsylvania's long-standing, constitutional interest in protecting the reputation of those within its jurisdiction. *See, Sprague, supra* at 438-439.

### C. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THE CONVERSION OF A MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT WHENEVER MATTERS OUTSIDE THE PLEADINGS ARE PRESENTED AND NOT EXCLUDED BY THE COURT

#### 1. The Court Should Have Applied Fed. R. Civ. P. 56, Notified The Parties And Allowed Dotson And Beverly To Conduct The Discovery Necessary To Respond To A Rule 56 Motion

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a plaintiff's complaint, and is to be granted only when it appears beyond doubt that the plaintiff can prove no set of facts supporting his claim for relief. *Conley v. Gibson, supra; Penn-Virginia Development Corp. v. Diversified Mortgage Investors*, 395 F. Supp. 195 (W.D. Pa. 1975). Normally, in deciding a motion to dismiss brought under Rule 12(b)(6), the courts will consider only the allegations of the complaint, the exhibits attached to the complaint and matters of public record. *See, Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1196 (3rd Cir. 1993). If other matters are considered, the Civil Rules require that the motion to dismiss

be converted to one for summary judgment, and that the parties be allowed to engage in discovery as provided in Civil Rule 56:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

Fed. R. Civ. P. 12(b) (emphasis added).

The provision of Rule 12(b) requiring a Rule 12(b)(6) motion to be converted into a Rule 56 motion upon the presentation of extrinsic materials is now mandatory. *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2nd Cir. 1991). As explained by the Third Circuit in *Pension Benefit Guaranty, supra*, "the reason that a court must convert a motion to dismiss to a summary judgment motion if it considers extraneous evidence submitted by the defense is to afford the plaintiff an opportunity to respond." *Id.* at 1196, citing *Cortec Industries, Inc. v. Sum Holding, L.P., supra. See, also, Festa v. Local 3 Int'l. Bhd. of Elec. Workers*, 905 F.2d 35, 38 (2nd Cir. 1990).

Appellee Trump submitted numerous matters outside the pleadings to support the affirmative defenses in her Motion to Dismiss that the "Town Hall" meeting held in Pittsburgh on May 19, 1997 was a legislative proceeding and that, therefore, all participants were entitled to absolute immunity for any and all statements made at the meeting.[10] Even Trump recognized, however, that Rule 12(b) required that her Motion to Dismiss be converted to a Rule 56 motion before such materials could be considered by the Court. "[Trump] has presented matters outside the pleadings in relation to points (1) and (4) and therefore, under Fed. R. Civ. P. 12(b), these arguments should be considered as if they supported a motion for

[10]Included among the materials submitted by Trump were the affidavit of a legislative assistant to one of the Congressmen in attendance at the "Town Hall" meeting, a copy of a bill introduced into Congress a few days prior to the "Town Hall" meeting (which bill Trump claims to have been the focus of the meeting) and a videotape of the "Town Hall" meeting apparently recorded and broadcast by a local cable television station. (J.A., pp. 30-35).

summary judgment and partial summary judgment respectively." (Memorandum in Support of Motion to Dismiss, J.A., p. 71, fn. 1). In fact, Trump specifically requested the District Court to convert her Motion to Dismiss into a motion for summary judgment, as required by the Civil Rules:

> Moreover, [Trump] requests that this Court give [Appellants] formal notice of its intent to treat the two arguments as if they were contained in a motion for summary judgment under Rule 56 and allow them an opportunity to submit additional evidence in opposition. *See Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989).

(Memorandum in Opposition to Motion to Exclude Extrinsic Materials, J.A., p. 285).

Dotson and Beverly opposed the Court's consideration of any materials outside the pleadings and promptly filed a Motion to Exclude. Alternatively, Dotson and Beverly agreed with Trump that if the Court considered such materials, Trump's Motion must be converted to one for summary judgment, and argued that Dotson and Beverly should be given notice and an opportunity to discover evidence to rebut the extrinsic materials submitted by Trump. (Reply Memorandum in Support of Plaintiffs' Motion to Exclude Extrinsic Materials, J.A., pp. 300-304).

Yet, in spite of the parties' mutual recognition that the Federal Rules of Civil Procedure required it to convert Trump's Motion to Dismiss into one for summary judgment, the District Court refused to do so, not only ignoring the Motion to Exclude Extrinsic Materials submitted by Dotson and Beverly, but depriving Dotson and Beverly of their rights as guaranteed by the Federal Rules of Civil Procedure.

This Court reversed Judge Lancaster just last year on similar grounds in *Independent Enterprises v. Pittsburgh Water*, 103 F.3d 1165 (3rd Cir. 1997). In that case, Judge Lancaster: 1) considered matters provided by the defendant which were outside the pleadings; 2) failed to give notice to the plaintiff that the motion to dismiss would be converted to a motion for summary judgment; and 3) failed to give plaintiff the opportunity to submit relevant material. This Court stated:

> Because [plaintiff] indeed was not given an opportunity to submit evidence to defeat a motion for summary judgment, we will treat the district court's decision as a 12(b)(6) dismissal and will disregard anything other than the allegations of the

> complaint when conducting our plenary review of that decision.

*Id.* at 1168, fn.2

Dotson and Beverly ask this Court to review Judge Lancaster's decision here in the same manner as it did his decision in *Independent Enterprises* and remand this case for further proceedings.

> 2. The Extrinsic Materials Submitted By Trump And Accepted By The District Court Are Not Irrefutably Authentic And Should Not Have Been Considered Without Opposing Evidence

In granting Trump's Motion to Dismiss, the District Court considered a copy of H.R. 1624 and a videotape of the "Town Hall" meeting where Trump's allegedly false and defamatory statements were made. (Memorandum Opinion, p. 2). Both items were attached as exhibits, not to the Complaint, but to Trump's Motion to Dismiss. Yet, the Court did not convert Trump's Rule 12(b)(6) Motion to a motion for summary judgment, or give Dotson and Beverly the opportunity to respond to the extrinsic materials through discovery. Instead, the District Court believed that it was proper to consider these materials because they were "irrefutably authentic":

> A court may also consider any irrefutably authentic documents that a defendant attaches as an exhibit to the motion to dismiss if the plaintiff's claim is based in whole or in part on the documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Memorandum Opinion, p. 2.

The District Court's reliance upon this language from the *Pension Benefit Guaranty* case is misplaced. In that case, the plaintiff's claim was based upon a purchase and sale agreement which was described in, but not attached as an exhibit to, the complaint. Instead, the defendant attached the agreement as an exhibit to the defendant's motion to dismiss. There was no dispute that the agreement submitted by the defendant was authentic and dispositive of the issues raised by the plaintiff's complaint.

The District Court also misinterprets the purpose behind the *Pension Benefit Guaranty* rule. The rule is designed to prevent a plaintiff from extracting a statement from a document and placing it in the complaint while, had the entire document been attached, it would have

been clear that the statement in the complaint was inapplicable to the matter. *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3rd Cir. 1997). Here, however, Dotson and Beverly took nothing out of context with respect to their defamation claims in Count II. Also, as this Court stated in *In re Burlington*, the rule is to allow the Court to consider materials upon which plaintiff based its claims. *Id.* at 1426. The Court never considered the merits of Dotson and Beverly's defamation claims. It only considered Trump's affirmative defense of legislative immunity. But, Dotson and Beverly *did not base their claims relating to legislative immunity on the meeting itself* but upon events prior to the meeting, initiated and orchestrated by the SEIU to attack Beverly. Under these circumstances, the District Court could not, nor should it have tried to, decide whether the meeting was a legislative proceeding by simply reviewing the tape supplied by Trump. The District Court stretched the purpose of the *Pension Benefit Guaranty* rule far beyond what this Court has held is proper.

There is no one document which irrefutably governs this dispute. The District Court found the issue of legislative immunity to be dispositive, but even the videotape of the "Town Hall" meeting submitted as an exhibit to Trump's Motion to Dismiss is not dispositive of whether the meeting was a "legislative proceeding." While an irrefutably authentic contract can be dispositive of a breach of contract action, the "Town Hall" videotape is, at most, some evidence of what was said, who was present and how the "Town Hall" meeting was conducted.[11] Nothing in the tape could possibly contravene what Dotson and Beverly said in their Complaint about how the meeting was orchestrated by the SEIU long before any legislation was introduced. Hence, the legislative immunity issue cannot be resolved without an inquiry into the purpose of the meeting, the motivation and intent of the participants, and the extent of the SEIU and Trump's involvement in planning and organizing the meeting.

### D. TRUMP'S STATEMENTS AT A POLITICAL RALLY ACCUSING DOTSON OF ANTI-SEMITISM AND CRIMINAL CONDUCT ARE DEFAMATORY UNDER PENNSYLVANIA LAW

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[11]In addition, the District Court had no evidence before it properly authenticating the videotape of the "Town Hall" meeting. The videotape was merely submitted as an attachment to an affidavit of Appellee Trump wherein she states that the videotape was a copy of a video purchased by the SEIU from a cable television station.

### 1. Pennsylvania Courts Have Never Held That Fact-Based Accusations Of Anti-Semitism, Racism Or Criminal Conduct Are Incapable Of A Defamatory Meaning As A Matter Of Law

In a confrontation at a political rally for presidential candidate Bob Dole on August 18, 1996, Appellee Trump accused Appellant Donald Dotson of being a "criminal" and shouted at him, "You people at Beverly are all criminals." Trump further accused Dotson of "devoting [his] entire career to busting unions," and then shouted at Dotson, "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

The District Court labeled Trump's statements about Dotson at the Dole Kemp rally as "mere obscenities, insults or other verbal abuse" or "mere hyperbole and insulting rhetoric" (Memorandum Opinion, pp. 4, 5), which the Court found to be incapable of defamatory meaning because no person would have taken such statements literally. In the process, the District Court concluded that an individual has no redress in the Commonwealth of Pennsylvania when he is falsely and maliciously accused of anti-Semitism. In reaching these conclusions, however, the District Court misconstrued Supreme Court doctrine and Pennsylvania precedent, and extended First Amendment protections well beyond the bounds of previous legal precedent.

The United States Supreme Court has long afforded First Amendment protection for "imaginative expression" and "rhetorical hyperbole." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). This protection, however, only applies to statements "that cannot reasonably be interpreted as stating actual facts about an individual." *Id.* at 17, 20, citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

Inexplicably missing from the District Court's Opinion is a citation to the leading case regarding the protection afforded rhetorical hyperbole, *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970). In that case, a prominent real estate developer sued a newspaper regarding its reports of various public meetings where the developer had attempted to secure zoning variances while, at the same time, the city considering those variances was trying to buy land from the developer. The articles accurately reported that some citizens who opposed the developer's efforts had characterized his position as "blackmail." The developer sued, claiming that the articles imputed to him the crime of blackmail. The Supreme

Court, however, found it constitutionally impermissible to impose liability for use of the word "blackmail" in this context:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: It was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

*Id.* at 14-15 (footnote omitted).

It cannot be credibly asserted that Trump's accusation that Dotson is a union-busting criminal is the same as the defendant's use of the word "blackmail" in the *Greenbelt Publishing* case. In *Greenbelt Publishing*, the lawsuit was based upon newspaper reports which fully explained the circumstances surrounding the use of the term "blackmail." Trump's accusations of criminal conduct by Beverly and Dotson were made with no context, and without any explanation being given to the accusations. As a result, other attendees at the Dole/Kemp rally could reasonably have interpreted Appellee Trump's statements as alleging actual facts about Dotson.

The one Supreme Court decision which the District Court did rely upon likewise fails to support its conclusion. In *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin*, 418 U.S. 264 (1974), a union was sued for including the plaintiffs on a list of "scabs" printed in a union newsletter, along with the publication of "a well-known piece of union literature, generally attributed to author Jack London" that defined "scabs" as having "rotten principles," lacking in character and being traitors. *Id.* at 268. Unlike the instant case, however, the Court in *Austin* found that the union's newsletter was published pursuant to its protected organizing activities and that, as in *Greenbelt Publishing*, "it is . . . impossible to believe that any reader . . . would have understood the newsletter to be charging [the plaintiffs] with committing the criminal offense of treason." *Id.* at 285-86.

By contrast, Appellee Trump's mean-spirited accusations did not invoke familiar rhetoric from historic trade union literature, but instead made specific accusations of illegal and immoral conduct. The U.S. Supreme Court would not, in this instance, find that it was "simply impossible" for a listener to believe that Trump's statements to Dotson were fact-based accusations. In fact, there are available substantial public records chronicling Dotson's long career in labor relations, as Assistant Secretary of the U.S. Department of Labor for Labor-Management Relations and as Chairman of the National Labor Relations Board, with which Trump's union-busting allegations could be objectively verified. On the other hand, there was no objective verification possible of the statements made in the *Greenbelt Publishing* and *Nat'l Assn. of Letter Carriers* cases. In fact, any comparison to the facts in either of those cases can only lead to the conclusion that Trump's statements at the Dole/Kemp rally are actionable.

Nor is the District Court's conclusion supported by the one Pennsylvania case upon which it relied. In *Kryeski v. Schott Glass Tech.*, 426 Pa. Super. 105, 626 A.2d 595 (1993), an employee who claimed to be a victim of sexual harassment and discrimination at her workplace alleged that a co-worker had defamed her by calling her "crazy." Unlike the present case, it was clear that the allegedly defamatory statement in *Kryeski* was mere name-calling, made in a casual and informal conversation which was not meant literally. *Kryeski, supra*, at 117. Likewise misplaced is the Court's reliance on a Virginia case, which held that claims of defamation based upon calling someone a "cocksucker" and "mother-fucker" were not actionable. (*See*, Memorandum Opinion, p. 4). This is not a case about simple name-calling, and there can be no comparison between the words used in the Virginia case and the words used by Trump in this case.

Perhaps most troublesome is the District Court's general conclusion that Pennsylvania courts do not provide redress for plaintiffs who have been accused of anti-Semitism, or other forms of bigotry and racism. In a brief footnote, devoid of legal analysis or citation to precedent, the District Court concludes that "the Pennsylvania courts have been consistent in holding that an allegation of bigotry is, without more, not actionable in defamation." (Memorandum Opinion, p. 5, n. 1). This is incorrect. If the District Court had carefully analyzed Pennsylvania case law on this issue, it would have found that Pennsylvania courts have *not* "consistently" held that allegations of bigotry and racism are never actionable.

Although dismissed summarily as "obvious dicta" in the District Court's footnote,[12] the Pennsylvania Supreme Court's most recent pronouncement on this issue, *MacElree v. Philadelphia Newspapers*, 544 Pa. 117, 674 A.2d 1050 (1996), more accurately reflects current social values in Pennsylvania and clearly demonstrates that liability for defamation based on an accusation of anti-Semitism cannot be avoided merely by labeling such accusation as angry name-calling.

*In MacElree v. Philadelphia Newspapers, supra*, a district attorney alleged that a newspaper letter-to-the-editor, which accused him of "electioneering" and which called him "the David Duke of Chester County," was libelous because it labeled him as a racist who abused his power as a district attorney to further his racist views. The case was dismissed by the trial court upon defendant's preliminary objections, which characterized the communication as merely labeling plaintiff as a racist. The Pennsylvania Supreme Court reversed, pointing out that "[a]lthough allegations of racism have been held not to be actionable defamation, it cannot be said that every such accusation is not capable of a defamatory meaning as a matter of law." *Id.* at 127. Only "where there is no possibility that harm can be established, and the communication is therefore not defamatory, [may] the trial judge . . . properly order that the case be dismissed." *Id.* Since allegations of racism against a district attorney could possibly lower the district attorney's reputation in the estimation of the community, or deter third persons from associating or dealing with him, the *MacElree* Court found it improper to dismiss the allegations of libel as a matter of law.

The *MacElree* Court stated that a charge of racism clearly could tend to harm the reputation of the accused so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Id.* at 127, citing *Thomas Merton Center v. Rockwell International Corp.*, 497 Pa. 460, 464, 442 A.2d 213, 215 (1981), cert.

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[12]Appellants are unable to explain the District Court's reference to "obvious dicta." Pennsylvania courts use Black's Law Dictionary to define "dicta" as: "Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases." *Pennsylvania v. Bradshaw*, 290 Pa. Super. 162, 166, fn. 4, 434 A.2d 181, 182, fn. 4 (1981), citing Black's Law Dictionary, 408 (5th ed. 1979). What the District Court erroneously referred to as "obvious dicta" in *MacElree* was an expression of the law of the Commonwealth that was used to reverse the lower court's decision in that case.

denied, 457 U.S. 1134 (1982). The Court went on to state "[w]here such a possibility exists, it is up to the jury as fact finder to determine its existence." *MacElree*, *supra* at 127. Clearly, Pennsylvania recognizes that charges of racism are *capable* of being considered defamatory. The District Court's responsibility in this matter was to review the defamatory comments alleged in the Complaint, and it should have denied Trump's Motion to Dismiss because the comments as alleged are capable of being considered defamatory.

Just like the former district attorney in *MacElree*, Dotson must be given the opportunity to establish harm to his reputation as a result of Trump's accusations of anti-Semitism. As a corporate executive in charge of labor and employment matters for the largest private owner of nursing homes in the country, where his responsibilities include the application and administration of federal equal opportunity and anti-discrimination laws, it cannot be said that, as a matter of law, Trump's statements would not lower Dotson in the estimation of the community or deter third persons from associating or dealing with him. In addition, Dotson spent many years in public service as Assistant Secretary of the U.S. Department of Labor for Labor-Management Relations and Chairman of the National Labor Relations Board, positions of great responsibility and national import in the field of labor management relations. Certainly, a person who has held such high public office, and who was ultimately charged with responsibility for implementing the country's labor laws in a fair and non-discriminatory manner, would be gravely harmed by unfounded accusations of anti-Semitism. Finally, Appellant Beverly is a large, nationwide organization which seeks to — and does — provide nursing and rehabilitative care to its residents without regard to ethnic, religious or racial considerations. The mere suggestion that one of its highest ranking executives could harbor or practice the type of prejudice alleged by Trump could have a devastating impact on both Dotson and Beverly. The Pennsylvania Supreme Court's most recent pronouncement on this issue indicates that more than a superficial analysis of the accusation must occur before the claim can be dismissed. It certainly cannot be done in the cursory manner afforded by the District Court in this case.

In fact, the Pennsylvania Court's holding in *MacElree v. Philadelphia Newspapers*, *supra*, casts doubt on the continued viability of its decision in *Rybas v. Wapner*, 311 Pa. Super. 50, 457 A.2d 108 (1983) (the only Pennsylvania case cited by Trump in support of her argument in the District Court that charges of anti-Semitism are not actionable as a matter of law). In *Rybas*, the Court found that a charge of anti-Semitism made in a

letter sent from one lawyer to another was not actionable. A key factor in the Court's decision, however, was the limited nature of the intended audience, i.e., one lawyer. "We need not speculate whether Wapner's alleged libel would be capable of a defamatory meaning if it appeared in some other context." *Id.* at 57, distinguishing *O'Donnell v. Philadelphia Record Co.*, 356 Pa. 307, 51 A.2d 775 (1947), cert. denied, 332 U.S. 766 (1947), finding that accusing a columnist of being a "Naziphile" in a newspaper article was in fact libelous.[13]

In short, Appellee Trump should not be allowed to escape liability for her accusation of anti-Semitism by superficially labeling it as a vigorous epithet. As with her accusations of union-busting and criminal conduct, a reasonable listener could have concluded that Trump was making fact-based accusations, which are objectively verifiable and which can appropriately form the basis of a defamation action. If allowed to stand, the District Court's Opinion clearly sends out the wrong message regarding the acceptability in Pennsylvania of accusations of criminal conduct, anti-Semitism, bigotry and other forms of racism.

2. Appellee Trump's Statements About Dotson At The Dole/Kemp Rally Did Not Arise In The Context Of A Labor Dispute

In addition to its finding that Trump's statements were either rhetorical hyperbole or vigorous epithets which were not meant literally and would not be taken seriously by those who heard them, the Court made

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[13] *Yaeger v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), cited by the District Court, does not support the decision below for two reasons. *First*, there was no doubt that the allegedly defamatory statements in that case arose in the context of a labor dispute, as the words at issue appeared on picket signs and handbills. *Second*, Ohio follows the doctrine of innocent construction, which was applied by the Court in *Yaeger*, and which requires any defamation complaint in Ohio to be dismissed if it is based upon a communication which is susceptible to both a defamatory and non-defamatory interpretation. Pennsylvania, to the contrary, requires defamation complaints to go forward if they are based upon communications which are susceptible to both defamatory and non-defamatory interpretations. *See, Gordon v. Lancaster Osteopathic Hospital Assn.*, 340 Pa. Super. 253, 261, 489 A.2d 1364, 1368 (1985), citing *Zelik v. Daily News Publishing Co.*, 288 Pa. Super. 277, 431 A.2d 1046 (1981); and, *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 422 A.2d 625 (1980).

a finding that Trump's accusations were made in the context of a labor dispute.

Trump's statements, however, were not made at a labor function and made no reference to any labor dispute then existing between Trump's employer and Dotson's employer. Instead, Trump's statements were personal attacks on Dotson maliciously made with the intent to harm his personal reputation. None of the constitutional defenses relied upon by the District Court, whether considered individually or in combination with each other, justify the early dismissal of Dotson's claims arising out of the malicious lies uttered by Trump at the Dole/Kemp political rally without at least affording Dotson the opportunity to discover facts relating to the knowledge, understanding and reaction of the recipients of those statements.

Drawing all reasonable inferences from the Complaint in Dotson's favor, it cannot be said, as a matter of law, that Trump's statements to Dotson at the Dole/Kemp rally arose "in the context of the labor dispute." The scene was a presidential campaign rally, not a picket line. The angry words which are the subject of Count I were directed at Mr. Dotson personally, and did not concern any outstanding issues between Appellant Beverly and the SEIU. Instead, Count I of the Complaint is based upon direct personal and verbal attacks, and not statements or slogans appearing on union campaign literature. Most importantly, Trump's words had nothing to do with any conditions of employment or other labor/management issues.

*Raffensberger v. Moran*, 336 Pa. Super. 97, 495 A.2d 447 (1984), relied upon by the District Court, does not support the Court's finding that the statements at issue arose in the context of a labor dispute. In that case, an employee truck driver sued a member of management based on an accusation that the employee was a "break down artist," a term commonly understood within the trucking business to describe drivers who intentionally break down on the road to collect additional wages. The Court attempted to define a standard by which to determine whether or not a defamatory publication arises in the course of a labor dispute. Turning to *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin, supra*, for guidance, the court in*Raffensberger* noted that the National Labor Relations Act ("NLRA") reflected "a Congressional intent to encourage free debate on issues dividing labor and management." *Raffensberger v. Moran, supra* at 106, 485 A.2d 452, quoting *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin, supra* at 272.

Thus, the Court in *Raffensberger* concluded that the statement at issue did in fact arise in the context of a labor dispute because it addressed a "condition of employment":

> It must be concluded, therefore, that the [defamatory publication] arose from and was related to a controversy or dispute between management and certain employees. That controversy, it seems clear, pertained to "conditions of employment."

*Id.* at 107, 485 A.2d 452. It should be noted that, even though the *Raffensberger* Court found that the "break down artist" accusation arose in the context of a labor dispute, the Court concluded that the accusation was capable of a defamatory meaning and sent the plaintiff's claims to a jury on the question of actual malice. The District Court should have done the same here for the reasons discussed in Section D.3., *infra*.

The *Raffensberger* Court's analysis of the meaning of "arising in the context of a labor dispute" is consistent with the definition provided by Congress in the Labor Management Relations Act of 1947:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 152(9).

Trump's accusations at the Dole/Kemp political rally did not in any way relate to a condition of employment or an issue in dispute between labor and management. Merely because the parties may have been engaged in collective bargaining negotiations at the time does not give Trump license to publicly accuse Dotson of criminal conduct or anti-Semitism. This is not the kind of "free debate on issues dividing labor and management" which Congress intended to encourage through the National Labor Relations Act. The District Court's conclusion that a reasonable listener to Trump's tirade against Dotson would understand that it stemmed from an ongoing labor dispute is supported by neither fact nor logic. The more reasonable inference, which the District Court was required to draw in considering Trump's Motion to Dismiss, is that most people who observed and heard Trump's statements at the Dole/Kemp rally would have

no reason to know they had anything to do with an ongoing labor dispute between Beverly and the SEIU.

3. The National Labor Relations Act Does Not Protect The Malicious Lie

According to the District Court, angry and defamatory words uttered by union members about management are excused if the parties are engaged in collective bargaining negotiations at the time the statements are made. This interpretation, however, would broaden the protection for defamatory statements issued in the context of a labor dispute far beyond existing precedent.

The seminal case on defamation in a labor dispute context, *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), makes clear that the "known lie" — an intentional or reckless falsehood — finds no safe harbor in the First Amendment. As the Court stated in *Linn:*

> [I]t must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

*Id.* at 67. Moreover, Pennsylvania courts may go no further than the United States Supreme Court dictates in protecting First Amendment principles, lest they violate Pennsylvania's Constitution which explicitly places an extremely high value on reputation:

> It is clear that the Supreme Court has set forth the parameters necessary to satisfy the dictates of the First Amendment. Any further action on our part could run afoul of our state constitution. Under Article I, Section 1 of the constitution of this commonwealth, a person's interest in his or her reputation has been placed in the same category with life, liberty and property.

*Sprague v. Walter*, 518 Pa. 425, 438-439, 543 A.2d 1078, 1084 (1988).

*In Linn v. United Plant Guard Workers, supra*, the U.S. Supreme Court recognized a strong interest in preventing and redressing attacks upon reputation, and held that an employer can properly recover damages in a tort action arising out of a labor dispute if the employer can prove "malicious intent" as defined by the Supreme Court in *New York Times*

*Co. v. Sullivan*, 376 U.S. 254 (1964). *See, also, Raffensberger v. Moran, supra;* and, *Community Medical Services of Clearfield, Inc. v. Local 265 AFSCME*, 292 Pa. Super. 238, 242, 437 A.2d 23, 25 (1981). Not allowing an employer to recover for the malicious lie would "totally deprive" a plaintiff of a remedy for an actual injury. *Linn v. United Plant Guard Workers, supra*, at 63. Furthermore, declaring any suit seeking damages under state law tort theories to be preempted by the National Labor Relations Act would "ignore the substantial state interest in protecting the health and well-being of its citizens," including its corporate citizens. *Farmer v. Carpenters*, 430 U.S. 290 (1977). Specifically, with regard to state law defamation claims, the Court in *Linn* explicitly stated that the NLRA does not preempt state law defamation claims:

> Whether either party to a labor dispute circulates false and defama tory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves the statements were made with malice and injured him.

*Linn v. United Plant Guard Workers, supra*, at 55.

Count I of the Complaint alleges that Trump's statements to Dotson at the Dole/Kemp political rally were made by Trump with knowledge of their falsity or in reckless disregard of their truth or falsity, the standard set forth in *New York Times Co. v. Sullivan, supra*, and adopted in *Linn v. United Plant Guard Workers* for allegations of defamation arising in a labor dispute. Further, Count I of the Complaint alleges that Trump's accusations have caused actual injury to Dotson's reputation. Thus, even if the District Court's finding that Trump's statements at the Dole/Kemp rally did, in fact, arise in the context of a labor dispute were plausible, the statements are actionable because the Complaint properly alleges that the statements were made with actual malice. As the relevant precedent clearly demonstrates, the country's labor laws do not protect the malicious lie.

## IX. CONCLUSION

For these reasons, Appellants Beverly Enterprises, Inc. and Donald Dotson respectfully request this Court to reverse the District Court's Memorandum Opinion and Order granting Appellee Rosemary Trump's Motion to Dismiss, and remand this case to the District Court so that it may proceed with full discovery and a trial on the merits of the Dotson and Beverly claims.

Respectfully submitted

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